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IN THE

Supreme Court of the United States

No. 416

L. E. RIFFE, *Petitioner*

v.

WILSHIRE OIL COMPANY OF TEXAS, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Petitioner, L. E. Riffe, seeks for the second time a Writ of Certiorari from this Court, containing the same issues, transactions, and substantially the same argument as were offered in his first Petition. The first Petition under the same caption (October Term, 1967, No. 184), was denied by memorandum order on October 9, 1967 (389 U.S. 822, 88 S.Ct. 50).

While the first Petition argued the issue whether, under the particular fact situation, Mr. Riffe should be found guilty of a breach of his fiduciary duty to Wilshire, which this Court declined to review, this Petition presents only the issue of what elements of damages are proper in a case in which a corporate principal has been found

guilty of a breach of his fiduciary duty to the corporation and, also, has violated his employment contract with that corporation.

It will be found from a reading of the Petition herein that, for the most part, Petitioner is exhuming the same grounds and the same argument advanced nearly two years ago, which were found without sufficient merit to warrant a review by this Court. He does so despite the realization that the only proper question in this Petition is a narrower one, as stated from that portion of his Petition entitled "Question Presented for Review," at page 3, to-wit:

> "He has already paid to Respondent an amount equal to the profit realized by the trusts from the stock. Is Petitioner also required to forfeit to Respondent all compensation earned during the period of ownership of the stock by the trusts?"

In the belief that Petitioner is not entitled to a Writ of Certiorari on the issues which previously were denied review, Respondent will discuss only that portion of the Petition pertaining to the issue of damages.

In support of his argument that he is entitled as an officer and director of Respondent to retain compensation for that period of time during which he was found to have breached his corporate fiduciary duties on the grounds that the company benefited financially during that period, Petitioner places great reliance on "one of the leading cases," *Richardson v. Blue Grass Mining Company,* 29 F. Supp. 658 (E. D. Ky. 1939), aff'd. *per curiam* 127 F.2d 291 (6th Cir. 1942), cert. denied 317 U. S. 639, 63 S. Ct. 30, 87 L.Ed. 515 (1952). That case sets out the general rule of damages in these situations (29 F. Supp. 658, at page 670):

> "The question as to whether the Johnsons forfeited all right to compensation for their services by

reason of breach of their fiduciary duties to the corporations and to the Tennessee Group as their co-stockholders is a troublesome one and demands careful consideration. The general rule that trustees who are faithless and dishonest in the performance of the duties of their trust forfeit all right to compensation is well established, and it applies to managing officers and agents of a corporation as well as to other persons acting in a fiduciary relation. Munro v. Smith, 1 Cir., 259 F. 1; Backus v. Finkelstein, D.C., 23 F.2d 357; Flint River Pecan Co. v. Fry, 5 Cir., 29 F.2d 457; Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 ALR 1; and Comingor v. Louisville Trust Company, 128 Ky. 697, 108 S.W. 950, 111 S.W. 681, 129 Am.St.Rep. 322. This rule is not so rigid and inflexible, however, as to leave no room for the exercise of judicial discretion. 65 C.J. 840, pp. 930, 931. 'Fortunately there is no unbending rule which a court of equity is bound under all circumstances to apply in cases of this kind; but that may be done, which in good conscience ought to be done in each particular case.' Appeal of Biddle, et al, 129 Pa. 26, 18 A. 474, 475."

Since it is the general rule, as cited by Petitioner, that trustees who are faithless and dishonest in the performance of the duties of their trust forfeit all right to compensation, applicable to managing officers and agents of a corporation as well as to other persons acting in a fiduciary relation, and this rule is applied subject to the equitable conscience and discretion of the trier of fact, there may be cases in which it is deemed unfair for a wrongdoing corporate principal to be required to forfeit compensation in the form of salaries and bonuses to his corporation, where it is found that his breach was not too severe and his long-term contribution to the corporation of merit. Obviously in the instant case, with the record before it and after careful consideration, the United States

Court of Appeals for the Tenth Circuit was of the opinion that Petitioner's breach of fiduciary duty was severe and the value of his contributions insufficient to overcome the application of the rule.

Petitioner cites no other authority of importance in support of his position, and Respondent respectfully submits that the decision in this matter is one that turns upon its own facts, will not specifically affect others than these litigants, and that the question presented is of no importance and unworthy of consideration by this Court.

Respectfully submitted,

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